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No. 88-898

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1988

LEE LEWIS COHEN AND
TERRY GEORGE RUGER,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

ON APPEAL FROM THE
SUPERIOR COURT OF PENNSYLVANIA

MOTION OF APPELLEE TO DISMISS

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MOTION TO DISMISS

The Commonwealth of Pennsylvania moves the Court to dismiss the appeal herein on the grounds that the questions on which the decision of the appeal depends are so unsubstantial as not to need further argument.

State Statute Involved

Appellants raise the question of whether Pennsylvania's statute prohibiting prostitution (Act of December 6, 1972, P.L. 1482, No. 334, § 1, as amended by the Act of October 4, 1978, P.L. 909, No. 173, § 2, presently codified at 18 Pa.C.S. § 5902) is void for vagueness as applied to them, owners and operators of a business which allowed male customers to purchase masturbation performed by nude or near-nude female employees.

Jurisdictional Statement

Cohen and Ruger have improperly invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2).

By Public Law 100-352, signed June 27, 1988, and effective in ninety days, section 1257 of Title 28, United States Code was amended so as to delete section 1257(2) and in its place provide that where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution of the United States review may be had in this Court by a writ of certiorari. 28 U.S.C. § 1257(a).

Cohen and Ruger contend that the statute which prohibits prostitution in Pennsylvania is violative of the due process requirements of the Fourteenth Amendment.

Public Law 100-352 became effective on September 26, 1988. The judgment from which an appeal could be taken to this Court was the Pennsylvania Supreme Court's denial of a petition for allowance of appeal. This order was entered October 5, 1988.

Accordingly, Cohen and Ruger must proceed under section 1257, Title 28, United States Code as amended on June 27, 1988, and this action should be brought before this Court as a petition for a writ of certiorari to the Pennsylvania Supreme Court.

Statement of Facts

Cohen and Ruger were the owners and operators of the Taj Mahal II, a massage parlor operating in Dunnstable Township, Clinton County, Pennsylvania. Among the services offered by their establishment

was a full body massage given to male customers by nude female masseuses. Male customers were able to purchase a "hand release," a euphemistic term for masturbation of the customer to the point of ejaculation.

Cohen and Ruger were arrested and convicted of charges of promoting prostitution of another person by owning, controlling, managing or supervising a house of prostitution. Following the denial of post-trial motions, Cohen and Ruger appealed to the Superior Court of Pennsylvania arguing, inter alia, that Pennsylvania's statute prohibiting prostitution was unconstitutionally vague as applied to them in that the definition of "sexual activity" was a limited definition which did not include masturbation. Pennsylvania's Superior Court

rejected this argument by relying on a prior decision based on an identical issue, but decided after the conviction of Cohen and Ruger. Cohen and Ruger sought allowance of appeal from the Pennsylvania Supreme Court. Allowance of appeal was denied in an order entered October 5, 1988.

Argument

A statute will be found void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954). Here, the relevant inquiry is whether the statute prohibiting prostitution in Pennsylvania gives the requisite warning that selling masturbation in the normal course of business is engaging in or

promoting prostitution. A common sense reading of the statute suggests that it does.

Pennsylvania establishes the offense of prostitution by providing that:

> A person is guilty of prostitution; a misdemeanor of the third degree, if he or she:
>
> (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business: . . .

18 Pa.C.S. § 5902. Sexual activity is defined as "includ[ing] homosexual and other deviate sexual relations." 18 Pa.C.S. § 5902(f).

In construing the requirement that adequate notice be given of proscribed activities, the Court has said: "[T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently de-

finite warning as to the proscribed conduct when measured by common understanding and practices." (emphasis supplied) Roth v. United States, 354 U.S. 476, 491 (1974).

When the language of Pennsylvania's statute is viewed in the light of common understanding and practices, the question becomes: if genital massage, to the point of sexual climax, administered to nude male customers by nude or near-nude female employees is not sexual activity for hire, what is it? The government suggests that to label such activity as anything other than sexual activity for hire requires a deliberate rejection of common sense and understanding.

Cohen and Ruger argue that the statute is impermissibly vague as applied to them in that the statute does

not specifically list masturbation as falling within the realm of sexual activity. Again, logic and common sense lead to the conclusion that masturbation, whose sole purpose is sexual gratification, is readily and simply understood to be sexual activity. Such a conclusion is supported by Pennsylvania's adoption of a principle of statutory construction that "words and phrases shall be construed according to rules of grammar and according to their common and approved usage: Act of December 5, 1972, P.L. 1339, No. 290, § 3, codified at 1 Pa.C.S. § 1903.

In Rose v. Locke, 423 U.S. 48, 49-50 (1975), this Court said that the prohibition against excessive vagueness "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. . . All the Due Process clause requires is

that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

In 1983, well before appellants' 1986 arrest and conviction, Pennsylvania's intermediate appellate court determined that the statute prohibiting prostitution was "directed at a defined evil (commercial exploitation of sexual gratification). . ." Commonwealth v. Potts, 314 Pa.Super. 256, 273, 460 A.2d 1127, 1136 (1983) (statute's prohibition against sexual activity for hire encompassed defendant's agreement to perform fellatio for hire). This decision established the statute's underlying purpose as the prohibition of the sale of sexual services and made clear that in construing the statute, the Pennsylvania courts would not focus on the means through which sexual gratification was

achieved, but rather on whether that gratification was commercially exploited.

Pennsylvania's prohibition against engaging in sexual activity as a business clearly reaches the sale of masturbation. This conclusion is easily arrived at by a common sense understanding of what constitutes sexual activity. Accordingly, this appeal presents no substantial question for this Court and should be dismissed.

Finally, this matter should not be heard because it is now settled in Pennsylvania that "sexual activity", as used in the statute prohibiting prostitution includes masturbation. In Commonwealth v. Robbins, 358 Pa.Super. 225, 516 A.2d 1266 (1986), appeal denied ___ Pa. ___, 526 A.2d 538 (1987), Pennsylvania's intermediate appellate court considered the identical question which appellants

herein seek to raise: namely, whether the prostitution statute prohibits the commercial exploitation of masturbation. The Superior Court applied a "common sense and understanding analysis" to the statute and concluded that "sexual activity," as defined in the statute included masturbation. In so doing, the Superior Court wrote:

> In the mind of a man of 'common intelligence' the term 'sexual activity' encompasses masturbation as a business. . . . It is difficult to believe that any man of common intelligence would consider the massaging of the genitals of an unclothed man by a nude or partially nude female to be anything other than sexual activity . . . . . When the term 'sexual activity' is examined in the light of the statute's underlying purpose of prohibiting commercial exploitation of sexual gratification and also in light of its common and approved usage,

> there is no doubt that masturbation for hire falls within the statute's proscription.

358 Pa.Super. at 230, 516 A.2d 1266, 1268-1269 (1986).

Accordingly, the matter is settled in Pennsylvania and the resolution of the matter presented to the Court by Cohen and Ruger is of importance only to themselves.

Conclusion

Wherefore, the Commonwealth of Pennsylvania respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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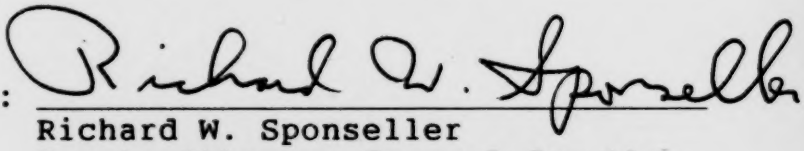
By: 

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